REMARKS

This submission is in response to the non-final Office Action mailed May 16, 2007.

Claims 1, 19, and 20 are amended herein. Specifically, claim 1 has been amended to more particularly claim a specific embodiment by amending the markush group for the NMDA receptpr antagonist, and by specifying benzalkonium chloride as the preservative. Also, Claims 19 and 20 have been amended to account for changes in claim dependency. Support for all claim amendments can be found in the corresponding original claims as filed. Claims 2-18 and 22-39 have been cancelled. Therefore, claims 1, 19-21, and 40-41 are currently pending.

No new matter has been introduced by way of this amendment. Reconsideration is respectfully requested.

I. Rejections Under 35 U.S.C. §103(a)

Claims 1 and 10-22 stand rejected as unpatentable under 35 U.S.C. 103(a) over GB 1330878 to Bristol Myers Co. ("Bristol") in view of U.S. Patent No. 6,638,981 to Williams et al. ("Williams"). According to the Examiner, BM allegedly teaches a composition of ketamine and benzethonium chloride. The Examiner relies on Williams to allege that benzalkonium chloride is an equivalent to benzethonium chloride. Further, the Examiner concedes that the references teach different dosage amounts for ketamine and benzalkonium chloride, however, the Examiner alleges one skilled in the art would be able to determine the claimed dosage amounts. Applicants respectfully traverse the rejection and request reconsideration.

Applicants respectfully submit that the claimed invention is not obvious over the art. Applicants respectfully submit that a *prima facie* case of obviousness has not been established. The Examiner has omitted any basis in the cited art for arriving at the NMDA receptor antagonists of the presently claimed invention. Applicants submit that the primary reference, Bristol, is directed to a process of resolving racemic ketamine for use in formulations containing benzethonium chloride (see page 2:40-45). However, Bristol fails to disclose or teach other compounds, aside from ketamine, which are claimed in the amended Markush group of dextromethorphane, dextrophan, dextropropoxyphene, ketobemidone, budipine, kynurenic acid, 1-hydroxy-3-aminopyrrolidin-2-one, spermine and spermidine (see amended claim 1). Furthermore, Bristol fails to teach or suggest the

claimed preservative, benzalkonium chloride. Applicants submit that further reliance on Collier and/or Williams fails to render obvious the claimed invention.

The Examiner is incorrect in asserting that Collier and/or Williams, as secondary references, in any way render the claimed invention obvious. Applicants submit that Collier's teachings are limited in scope particular formulations of certain glutamate antagonists (eliprodil and ifenprodil) which are not claimed by the present invention. Applicants also submit that the Examiner's reliance on Williams is misplaced. Williams fails to provide any plausible teaching of equivalence of preservatives.

The Examiner has entirely overlooked the basis of the invention, namely that benzalkonium chloride and benzethonium chloride have surprising differences. While the compounds may appear to be similar, the Applicants' invention is based on the discovery that they are not functionally equivalent, despite the long time belief that they are functional equivalents. The M.P.E.P. provides guidance for this exact situation: "In order to rely on equivalence as a rationale supporting an obviousness rejection, the equivalency must be recognized in the prior art, and cannot be based on . . . the mere fact that the components at issue are functional or mechanical equivalents." M.P.E.P. § 2144.06; *In re Ruff*, 256 F.2d 590, 118 USPQ 340 (CCPA 1958). The Examiner's reliance on an assertion that the two preservatives are "functional equivalents" is in direct conflict with the guidance set forth in the M.P.E.P. Thus, the Examiner has failed to provide the requisite prima facie case of obviousness.

Even assuming that a *prima facie* case of obviousness has been established, which Applicants do not concede, Applicants have provided unexpected results to rebut any *prima facie* case in the Amendment filed February 28, 2007. Applicants submit that in compositions of NMDA receptor antagonists, the choice of preservative can have a significant impact on neurotoxicity. Applicants respectfully submit that the amendments and arguments provided overcome the obviousness rejection and place the claims in condition for allowance. Accordingly, Applicants request that the rejection be withdrawn.

II. Double Patenting Provisional Rejection

Claims 1, 10-17, 19-22, and 40-41 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting over copending application 10/256,283, now U.S. Patent No. 7,273,889. Applicants have amended claim 1 to remove ketamine from the markush group of NMDA receptor antagonists and have cancelled claims 2-18 and 22-39 to overcome the double patenting rejection. Accordingly, the Applicants request that the rejection be withdrawn.

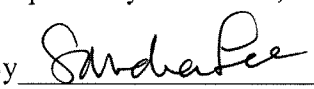
III. Conclusion

Therefore, in view of the above amendments and remarks, it is respectfully requested that the application be reconsidered and that all pending claims be allowed and the case passed to issue.

If there are any other issues remaining which the Examiner believes could be resolved through either a Supplemental Response or an Examiner's Amendment, the Examiner is respectfully requested to contact the undersigned at the telephone number indicated below.

Dated: November 13, 2007

Respectfully submitted,

By 

Sandra S. Lee
Registration No.: 51,932
Baker Botts L.L.P.
30 Rockefeller Plaza
44th Floor
New York, NY 10112-4498
(212) 408-2500
(212) 408-2501 (fax)

Attorneys/Agents For Applicant